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In the

Supreme Court of the United States

OCTOBER TERM, 1982

GREEN BAY PACKAGING INC., ST. VINCENT HOSPITAL, AND LEO N. CROWLEY,

Petitioners,

vs.

TECHNICON MEDICAL INFORMATION SYSTEMS CORP.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE, BUT HAS NOT BEEN, SETTLED BY THIS COURT.

It is curious that Respondent alone labels the question presented as a "semantic" one which may only be of "historical" interest, while the American Bar Associa-

tion reports that "Lawyers continue to be plagued by the uncertainty of the interplay between state trade secret law and federal copyright protection." 1981 ABA COMMITTEE REPORTS, SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW 91, 93 (presented at the annual meeting, August 7-12, 1981).[1]

At page three of the Petition for writ of certiorari, under the introductory statement, Petitioners have already asserted that "this case presents a question of great importance, which has vexed those asserting and defending against alleged trade secret rights for at least the past 70 years, but which has never been addressed by this Court." Confronted with that statement and the reported views of the members of the American Bar Association, Respondent's feeble retort is that Petitioners have failed to specify the portion of the Supreme Court Rules under which certiorari is sought.

In order that their position be crystal-clear, Petitioners expressly rely upon Rule 17(1)(c) of the Rules of the Supreme Court of the United States:

> When . . . a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court . . . .

Petitioners urge, for the reasons amply stated in the petition, that the important question presented should be decided by this Court in order to give uniform guidance in the interpretation of the federal Copyright Law.

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[1] Despite several inaccurate or misleading statements in the section of Respondent's brief entitled "Factual Background," this reply brief will address only the two issues argued by Respondent, that is, the importance of the question presented and the interpretation of the Universal Copyright Convention Treaty.

Respondent tries to belittle the importance of the question presented for certiorari by asserting that the 1969 Copyright Act has been superseded by the 1976 Act and therefore is of no import.[2] As the Seventh Circuit Court of Appeals commented, any expectation that the question presented would no longer arise is "wishful thinking." *Technicon Medical Information Systems Corp.* v. *Green Bay Packaging Inc.*, 687 F.2d 1032, 1034 n.4 (7th Cir. 1982), App. 3 n.4. The same question can arise under the 1976 Act; therefore respondent's argument that this case is merely of "historical" interest is incorrect.

Additional reasons exist for granting the requested writ. First, it is naive to assume that the statutory estoppel created by copyright notice will cease to exist because of the 1976 Copyright Act. The concepts of publication and notice are inextricably intertwined in both the 1909 Copyright Act and the 1976 Copyright Act. *See, e.g.*, M. NIMMER, NIMMER ON COPYRIGHT §§ 4.01, 7.04-7.14 (1982). Indeed, the content of copyright notice under the 1976 Copyright Act (17 U.S.C. § 401(b) (Supp. IV 1980)) is substantially identical to that set forth

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[2] Additionally, at page 8 of its brief, Respondent implies that two cases in which certiorari was denied two years ago involve similar issues. However, the questions presented in these cases were far afield. *Mitchell Brothers Film Group* v. *Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979), *cert. denied sub nom., Bora* v. *Mitchell Brothers Film Group*, 445 U.S. 917 (1980) involved the extent to which the "obscenity" of a copyright work could be a defense to copyright infringement (see questions presented in Petition for Certiorari, 48 U.S.L.W. 3556 No. 79-1088, Sup. Ct. 1980)), while *Morseburg* v. *Balyon* 621 F.2d 972 (9th Cir. 1980), *cert. denied*, 449 U.S. 983 (1980), concerned the constitutionality of a California resale royalties act (see questions presented in Petition for Certiorari, 49 U.S.L.W. 3335 (No. 80-411, Sup. Ct. 1980)).

in the 1909 Copyright Act (17 U.S.C. § 19 (1976))[3] and, as with the 1909 Copyright Act and the Universal Copyright Convention, © also signifies a published work in the 1976 Copyright Act. Also, contrary to respondent's assertion, the issue presented here is one of *estoppel*, and not pre-emption. Finally, both the 1909 and 1976 Copyright Acts provide criminal sanctions for fraudulent use of the statutory copyright notice (compare 17 U.S.C. § 105 (1976) with 17 U.S.C. § 506 (Supp. IV 1980)), evidencing Congressional concern that the public not be misled by misuse of the statutory notice.

The important question presented obviously can and unquestionably will arise again under *either* Act unless this court resolves the issue.

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[3] The text of Section 401(b) of the 1976 Act is as follows:

(b) FORM OF NOTICE. — The notice appearing on the copies shall consist of the following three elements:

(1) the symbol © (the letter C in a circle), or the word "Copyright," or the abbreviation "Copr."; and

(2) the year of first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and

(3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

II. THE CONFLICT BETWEEN THE COURT OF APPEALS DECISION AND THE UNIVERSAL COPYRIGHT CONVENTION NECESSITATES GRANT OF THE PETITION.

In a rather cryptic page-and-a-half argument consisting primarily of quotations from Professor Nimmer's book, Respondent attempts to support its broad assertion that the Seventh Circuit Court of Appeals decision does not conflict with the Universal Copyright Convention Treaty. Respondent overlooks that, as quoted at page three of the petition, the Universal Copyright Convention defines a form of notice that includes the year of first publication, and "publication" is defined as "general distribution to the public . . . ." Respondent has invoked the protection of the Universal Copyright Convention and is therefore estopped to deny that its computer manuals are freely accessible to the public. By totally omitting reference to the Universal Copyright Convention, both the District Court and the Seventh Circuit Court of Appeals have neglected to consider the impact of improper use of copyright notice in a form prescribed by the Universal Copyright Convention.

Also, respondent's own cited authority supports petitioners' estoppel argument and emphasizes the importance of the © symbol in the notice pursuant to the Universal Copyright Convention. Nimmer explains that using the © symbol invokes the protection of the Universal Copyright Convention: "It is significant . . . as a device for excusing any other formalities which a country might otherwise require as a matter of its own domestic law." M. NIMMER, NIMMER ON COPYRIGHT § 17.08 (1982). If a person has affixed a "©" and date of publication to a work, and has distributed the work to the public, then the person has represented that the work is published

pursuant to the Universal Copyright Convention, and the work can no longer enjoy inconsistent status as trade secret material.

This Court's guidance is needed to insure that the relationship of the United States with the other signatories of the Treaty is not adversely affected by the Seventh Circuit's decision.

III. CONCLUSION

For the reasons set forth above, Petitioners again urge that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment and opinion of that Court.

Respectfully submitted,

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